

INSURANCE: Joint stock companies doing business under Sec. 5793, R. S. Mo. 1929 may not issue participating policies.

August 14, 1936.



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Honorable R.E. O'Malley,  
Superintendent of Insurance,  
Jefferson City, Missouri.

Dear Sir:

This department is in receipt of your letter of July 9, requesting an opinion as to the following:

"\* \* \* May a joint stock insurance company, organized or licensed to transact business under the provisions of Article 6 of Chapter 37, Revised Statutes of Missouri, 1929, issue a participating policy covering risks that may, under the provisions of this article, be the subject of insurance? \* \* \* \*"

Section 5796 of Article VI, Chapter 37, Revised Statutes of Missouri, 1929, provides in part as follows:

"Corporations may be formed for the purpose of doing business mentioned in the first class or division named in Section 5793 either on the stock or mutual plan and for the purpose of doing the business mentioned in the second and third classes or divisions on the stock plan \* \* \* \* ; and it shall not be lawful for any corporation so formed to do business on any other plan than that upon which it is organized \* \* \* \* ;"

The Legislative intent is thereby made clear. Corporations organized for doing business under the first class named in Section 5793 must be formed either on the stock or mutual plans, and not both, and corporations formed for doing business under the

second and third classes must be formed only on the stock plan. We believe that the General Assembly intended that corporations doing business on the stock plan should be corporations owned and controlled entirely by the stock-holders and in neither the management nor the profits of which the policy-holders participate.

While it is true that our laws relating to life insurance permit the issuance of participating and non-participating policies, that principle does not apply as well to fire insurance companies, and the reason therefor "may be that while science has conquered the terrible plagues and epidemics of the past and has made human life more stable than it ever was before, science has not yet been able to devise a means against devastating conflagrations \* \* \* " General Insurance Co. of America v. Hamm, 57 P. (2d) 671. We are therefore of the opinion that by reason of Section 5796, R.S. Mo. 1929, a joint stock company doing business under Sec. 5793 may not issue participating policies of insurance, and the opinion of the former Attorney General dated April 30, 1929 is erroneous and hereby overruled.

There is another reason, however, and a more important reason from the viewpoint of public policy why these joint stock companies doing business under Section 5793 may not issue participating policies, and that is because such companies are subject to the fire rating law of this state, Article VIII, Chapter 37, Revised States of Missouri, 1929, and for such companies to issue participating policies would disturb the rate filings of these companies and would constitute a positive violation of the spirit and letter of our law.

There is no question but that the business of insurance is so far affected with the public interests as to justify legislative regulation of its rates. In the case of German Alliance Insurance Company v. Lewis, 233 U. S. 389, Mr. Justice McKenna said:

"It is manifest that the rates of insurance which it becomes necessary for insurance companies to charge depend upon the premiums received and losses sustained by them; to the end that insurance rates shall operate equitably, the Legislature has \* \* \* \* provided against discrimination. It is important both to preserve the solvency of insurance companies and for the equitable application of the rates charged for insur-

ance, that such rates shall be determined upon scientifically."

In the recent case of General Insurance Company of America v. Hamm, decided by the Supreme Court of Wyoming May 5, 1936, the precise question here involved was passed upon by that Court. The Insurance Commissioner of Wyoming had taken the position that a stock company had no right to issue a policy providing for the participation in the earnings of the company. The Court, after sustaining the position of the Insurance Commissioner on statutory grounds, said:

"\* \* \* \* The judgment must be reversed for another reason, Sub-division 9 of Section 57-216, Rev. St. 1931, provides that 'Any variation of any company or insurer from the schedule of rates established and maintained by the bureau which it maintains, or of which it is a member, shall be uniform in its application to all of the risks in the class for which the variation is made ' etc.

"The provision was under consideration by the Supreme Court of Ohio in the case of General Insurance Co. et al v. Bowen, 130 O.S. 82, 196 N. E. 774, in which the plaintiff in this case was one of the plaintiffs. It wrote, in the State of Ohio, a policy which in effect was a one year policy, at the same annual rate as a straight five-year policy, thus reducing the cost thereof. The court held that this resulted in a different annual rate for the same risk or similar risks in the same class in violation of the law providing that any deviation 'shall be uniform in its application to all of the risks in the class for which the variation is made.' The result in that case would follow in this, if participating policy-holders were to receive what would substantially be a rebate from a participating fund, a rebate which would not apply to other policies. We think that the holding of the Ohio court should be applied here.

"We need not determine whether or not a different rule should apply in case the plaintiff would issue all of its policies in this state as participating policies. The petition alleges merely that plaintiff 'is now prepared to issue policies \* \* \* to carry, on said policies, ' the endorsement mentioned in the statement of facts herein. Presumably it is now writing non-participating policies, and to leave the judgment herein stand would mean that the company could write one or the other as it pleased. That would violate the spirit of the law. We might say further, that on account of the uncertainty of the amount of any rebate on any policy, and the probable differences in amounts, if any, to be distributed in any one year, an inquiry might well be raised as to whether the uniformity contemplated by the statute could be effected under any such participating policy as the plaintiff proposes to issue. We need not, however, determine that point."

#### CONCLUSION

In view of the foregoing, it is the opinion of this department that a joint stock company doing business under Section 5793, Revised Statutes of Missouri 1929 may not issue participating policies for the following reasons:

(1) Because it was the intention of the Legislature in enacting Section 5796, R. S. Mo. 1929, to prohibit such companies from issuing participating policies; and

(2) That such companies are subject to the fire rating law of this State, Article VIII, Chapter 37, R. S. Mo. 1929, and for such companies to issue participating policies would disturb the rate filing of such companies and would constitute a positive violation of the spirit and letter of the fire rating

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law; and for the further reason that in view of the uncertainty of the amount of any rebate on any policy and the probable differences in amounts, it is doubtful if the uniformity contemplated by the statute could be affected.

Respectfully submitted

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APPROVED:

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ROY MCKITTRICK,  
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